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No. 74-513

In the Supreme Court of the United States

OCTOBER TERM, 1974

LEONARD L. CAPPETTO, STANLEY J. MIKOLAJCZAK, JOSEPH A. CORABI, THOMAS J. WILSON, JOSEPH I. MANTIA, GEORGE J. MUSTEIKAS and NICHOLAS J. PIDONE,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY

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May It Please the Court:

Bearing in mind the provisions of Rule 24, this Reply is limited to arguments first raised in the government's brief in opposition.

The respondent contends that most of the issues raised by petitioners are not properly before the Court. In that aspect, the government argues that the contempt orders were not appealable at all. It concedes that temporary

injunction is appealable, but states that the only issue is whether the district court abused its discretion. We will here briefly urge that both those contentions are untenable.

The government further states that the statute is relatively new, so that there is no conflict among the circuits concerning the issues we have raised. That contention is necessarily correct as far as it goes, since the opinion below was the first ever to consider the relevant statute at the appellate level. However, a conflict has assuredly arisen at the district court level. We here append and briefly discuss a recent district court opinion inconsistent with the basic thrust of the opinion here sought to be reviewed, in regard to the fundamental issue between the parties.

Finally, we would note that the government has restated one of our principal contentions so as to avoid entirely the question whether investment or infiltration is a necessary element of the civil action under 18 USC 1962.

1.

The government here contends for the first time that the contempt orders were not appealable. (In the trial court it adopted the opposite view, and in the Court of Appeals the issue was neither raised nor considered.)

The philosophical base of the government's contention was directly rejected by this Court's recent opinion in *Maness* v. *Meyers,* (No. 73-689, January 15, 1975, 16 Cr. L. 3023, 3027). It also proceeds from a total misconception of the citations on which the government relies.

If it were true that the government could file a civil suit against an alleged criminal to compel a confession of criminality, on pain of indefinite imprisonment without

right of appellate review, that would be the most frighteningly authoritarian aspect of the entire proceeding.

But it is not true. The government cites *Doyle* v. *London Guaranty,* 204 U.S. 599, which merely construed the jurisdictional requirements of the Circuit Court of Appeals Act of 1891. 204 U.S. at 608. Appeals from contempt adjudications based on refusals to testify are now authorized by express statute, 28 USC 1826 (b). That is a total answer to the government's contention. (Its other citations deal with conditional rulings, appeal wherefrom was obviously premature.)

In any event, the question whether a contempt adjudication against a party is appealable immediately or whether it must await the final judgment, is determined by whether purely private rights are involved, or whether the purpose of the citation was "to redress the public wrong" or "vindication of the public justice". *Leman* v. *Krentler-Arnold Co.* (1932) 284 U.S. 448, 456; *Fox* v. *Capital Co.* (1936) 299 U.S. 105, 107, 110; *Michaelson* v. *United States* (1924) 266 U.S. 42, 64; *Gompers* v. *Bucks Stove and Range Co.* (1910) 221 U.S. 418, 445.

The government is not here as a private litigant, seeking redress for damage to a mail truck. Instead, it seeks to vindicate public rights stemming from alleged violations of criminal statutes. Where (as here) a contempt has both civil and criminal features, "the criminal feature of the order is dominant and fixes its character for purposes of review". *Union Tool Co.* v. *Wilson* (1922) 259 U.S. 107, 110.

Appealability is not determined by slogans. The rights asserted here amply meet the test of *Cohen* v. *Beneficial Loan Corp.* (1949) 357 U.S. 541, 546, in that they are procedural rights separable from and collateral to the gov-

ernment's claim to equitable relief. Even in civil matters, "the requirement of finality is to be given a practical rather than a technical construction". *Gillespie* v. *U. S. Steel Corp.* (1964) 379 U.S. 148, 152. This Court has recently provided a firm restatement of those principles, in a proceeding whose claim to finality was certainly no more compelling than are the contempt adjudications here. *Eisen* v. *Carlisle and Jacquelin* (1974) No. 73-203, 94 S.Ct. 2140, 2149.

Against these compelling authorities, the notion that these contempt adjudications are not final and appealable is jarring to the ears of both precedent and reason.

2.

The government contends that the only issue is whether the trial court abused its discretion. That argument seems somewhat misplaced as a response to petitioners' contentions that the order lacked a jurisdictional base and reflected a constitutionally invalid procedure.

The argument is not merely irrelevant, but lacks record support as well. The injunction order simply did not represent an exercise of discretion in any degree whatever. The district court rendered the injunction as an automatic response to a finding of default (App. 20-27), without hearing any evidence whatever, and in express rejection of the petitioners' arguments that some special circumstance must be shown in order to justify an injunction. The Court of Appeals likewise treated the injunction as automatic and expressly held that it was unnecessary to show any facts upon which a discretionary ruling might be based. Where discretion is not exercised, an order may not be affirmed merely because discretion could have been exercised. *United States* v. *Brown,* (2d Cir 1972)

470 F. 2d 285, 287-288; *Cf. United States* v. *Wells* (7 Cir. 1967) 387 F. 2d 807, 808.

3.

We think it completely beyond question that in the language of Rule 19 (b), the court below "has decided an important question of federal law which has not been, but should be settled by this Court". The government's brief in opposition does not appear to express any quarrel with that proposition. If that were not enough, we would further urge that it "has decided a federal question in a way in conflict with applicable decisions of this Court", and that it has both accomplished and sanctioned departure from the judicial norm of such magnitude, as to "call for an exercise of this Court's power of supervision". Rule 19(b).

The government states that there is as yet no conflict among circuits. There could hardly be such, since only one circuit has considered the problem.

But on January 17, 1975 the United States District Court for the Northern District of Illinois rendered an opinion basically inconsistent with the opinion here sought to be reviewed. *United States* v. *Finn,* U.S.D.C. N.D. Ill. E.D., Docket Number 74 C 2925, (certified copy herewith lodged with the Clerk, relevant portions reprinted as Appendix to this Reply). Conceding that it was bound by the decision here presented for review, the district court in *Finn* nevertheless stated that it was "clearly troubled by the inadequate attention which the Seventh Circuit gave to its discussion of *Boyd* [v. *United States* (1886) 116 U.S. 616, 634] and *In re Winship,* 397 U.S. 358 (1970). With no disrespect intended to our appellate court we think they bypassed the key issue underlying the thrust

of defendants' attack on the Organized Crime Control Act." (App. 2)[1]

The *Finn* court "conclude(s) that civil proceedings like those being conducted herein are subject to a criminal burden of proof," (App. 3), referring to them as "quasi-criminal" (App. 3). Its opinion accordingly holds the government to a reasonable doubt standard, and affirms the existence, in actions brought under Section 1962, of a primary Fifth Amendment right identical to that accorded in criminal cases.

Consistent with that view, the *Finn* court declined to order the defendants to respond to requests for admissions under Federal Civil Rule 36, even though such admissions are made "for purposes of the pending action only".

Although *Finn* purports to consider only areas not reached by the decision in this case, it is clear beyond argument that on the most fundamental issue here presented for resolution—does the defendant in such a "civil" case enjoy such criminal constitutional protections as the reasonable doubt standard and the full self-incrimination privilege?—the *Finn* court reaches a conclusion directly opposed to that expressed in the opinion below.

4.

Our petition contends that gambling does not come within Section 1962 unless the gambling proceeds are used to acquire or control another interstate enterprise whether legal or illegal. (Pet. 25-28) The government responds only that the infiltrated enterprise need not be a legiti-

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[1] Appendix references are to the *Finns* opinion reprinted in relevant part at the end of this Reply.

mate one (Brief in Opposition, pp. 10-11). We hope that your Honors will agree that the government has not responded in any degree to the point that we have made, and that the respondent's failure to discuss that issue should not prevent consideration of a matter of such significance.

5.

For the past several years, this Court repeatedly has expressed concern with the simple volume of federal litigation. Many recent decisions have tended to restrict that flow, particularly against the influx of minor and inconsequential claims. *Zahn* v. *International Paper Co.* (1973) 414 U.S. 271; *Eisen* v. *Carlisle and Jacquelin* (1974) No. 73-203, 94 S.Ct. 214, 40 L. Ed. 2d 732; Cf. *Gulf Oil* v. *Copp Paving,* No. 73-1012, 12/17/74, 43 L.W. 4059, and *American Radio Association* v. *Mobile Steamship Association,* No. 73-748, 12/17/74, 43 L.W. 4068.

In this case, the government operated a wiretap and discovered activity which must by any rational definition be called a small-time gambling operation. The wiretap is presumed legal. The government could simply have handed over its evidence to state authorities for criminal prosecution, thus ending the gambling activity. It could have filed routine federal criminal charges.

Instead, it invoked federal equitable process. The result must be not only protracted and complex district court litigation, but almost an unending period of collateral supervisory proceedings. It indignantly rejected any suggestion that any special circumstance need be shown as a condition or justification for such litigation—and in that view it was sustained.

Surely there can be no effective doctrine of judicial economy which does not embrace the activities of the

government, the most active single litigant in the federal system.

The government's attempt to justify the result below as a routine product of judicial discretion is untenable from the outset, as argued, because that discretion was never exercised. But if discretion is to be the test, we confidently invite this Court's consideration of that issue. If discretion can be said to have been employed below, it was assuredly exercised in a manner contrary to this Court's articulated philosophy.

Respectfully submitted,

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